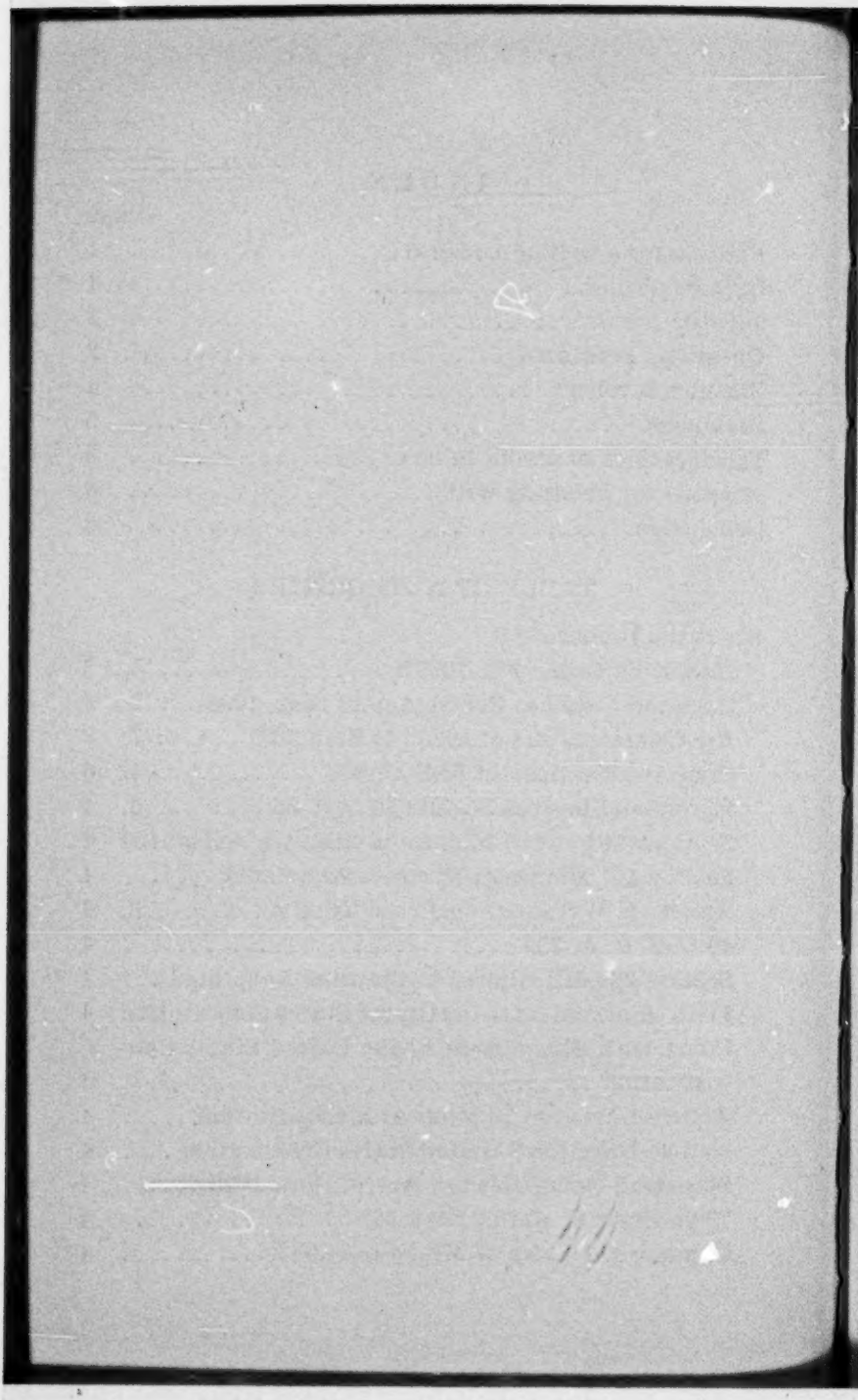
INDEX

	Page
Petition for a writ of certiorari	1
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	4
Statement	5
Specifications of errors to be urged	5
Reasons for granting writ	6
Conclusion	8

TABLE OF AUTHORITIES

STATUTES INVOLVED:

Executive Order No. 10092 4,	5
Superior National Forest Act 26 Stat. 1095 3,	4
Air Commerce Act of 1926 (44 Stat. 568) ..4, 5, 7,	8
Civil Aeronautics Act 55 Stat. 980 4,	6
Egress and Ingress Statute 30 Stat. 36 3,	4
Sections 104 to 109 Minnesota Statutes Annotated	4
Section 101 Minnesota Statutes Annotated	4
Article II Webster-Ashburton Treaty 3,	4
40 U. S. C. A. 255	4
Section 260.012 Minnesota Statutes Annotated	4
Fifth Amendment to the United States Constitution	4
Fourteenth Amendment to the United States Constitution	4
Article I, Section 13 Minnesota Constitution	4
Article I, Section 8 United States Constitution	4
Shipstead-Nolan-Newton Act 46 Stat. 1020	4
Thye-Blatnick Act 62 Stat. 568	4
Chapter 412 Laws of Minnesota 1933	4



In the Supreme Court of the United States

October Term, 1953
No. ————

JOSEPH PERKO, ELWYN WEST, MARTIN SKALA and WILLIAM ZUPANCICH, Petitioners,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in cause No. 14740 entitled Joseph Perko, Elwyn West, Martin Skala and William Zupancich, Appellants, v. United States of America, Appellee.

OPINIONS BELOW

The opinion of the District Court (R. 36) is reported in 108 Fed. Sup. 315. The opinion of the Court of Appeals (R. 4) is reported in 204 Fed. 2d 446.

JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1953 (R. 12). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

First: Does the President of the United States of America have authority, by executive order, to set apart an airspace reservation for any and every governmental purpose?

Second: Is it a lawful delegation of power for Congress to grant to the President of the United States the right to set aside an airspace reservation for any and every governmental purpose in any part of the United States?

Third: If the President has authority to set aside an airspace reservation for any and every governmental purpose, any place in the United States of America, is it not necessary for him to set forth in his executive order the purpose for which the airspace reservation is set aside?

Fourth: In this case the President has set aside an airspace reservation which prohibits the use of aircraft within the State of Minnesota. Does the President of the United States have authority, by executive order, to interfere in this manner with intrastate commerce?

Fifth: The appellants in this case are owners of land in the so-called roadless area of Superior National Forest. Titles to their lands came down to the appellants from patents of the United States of America issued before or shortly after the turn of the century; before

Superior National Forest was created (February 13, 1909)—in fact—in at least one instance, before the enactment by Congress of a law which authorized the President to set aside and preserve, by proclamation, public lands bearing forests (26 Stat. 1095) under which Superior National Forest was created. From the very beginning of the Government (Vol. 23 Opinions of Attorney General of the United States 589) it has been the policy of the United States of America to keep the public domain open to its citizens for all lawful purposes and Congress has expressly stated (30 Stat. 36) that the public domain is open to actual settlers for ingress to and egress from their property and to citizens of the United States for all lawful purposes. The executive order involved in this case takes from the appellants the right of ingress to and egress from their property and destroys the value of the same. This is not done for public defense. It is done, according to the claim of the Government, to preserve the wilderness area. No proceedings for condemnation have been instituted and no compensation to the petitioners is provided. They are, by the executive order of the President and the injunction of the lower courts, restrained and enjoined from going to their homes and resorts in the forest. Does this not take from the petitioners property without due process of law?

Sixth: The Webster-Ashburton Treaty fixes the boundary between the United States of America and the Dominion of Canada and provides that all water communications along the line shall be free and open to the citizens and subjects of both countries. Does the President of the United States have authority, by executive

order, to take from a citizen of the United States the right to land his airplane on these international waters?

Seventh: Can the United States of America take from a citizen the right to trial by jury by obtaining an order restraining him from violation of an executive order of the President and punishing him for contempt for violation of that order?

Eighth: Does the Civil Aeronautics Act of the United States of America (55 Stat. 980) give to the Government the right to regulate intrastate commerce?

STATUTES INVOLVED

The applicable statutes are the following:

Executive Order No. 10092;
Superior National Forest Act 26 Stat. 1095;
Air Commerce Act of 1926 (44 Stat. 568);
Civil Aeronautics Act 55 Stat. 980;
Egress and Ingress Statute 30 Stat. 36;
Sections 104 to 109 Minnesota Statutes Annotated;
Section 101 Minnesota Statutes Annotated;
Article II Webster-Ashburton Treaty;
40 U. S. C. A. 255;
Section 260.012 Minnesota Statutes Annotated;
Fifth Amendment to the United States Constitution;
Fourteenth Amendment to the United States Constitution;
Article I, Section 13 Minnesota Constitution;
Article I, Section 8 United States Constitution;
Shipstead-Nolan-Newton Act 46 Stat. 1020;
Thye-Blatnick Act 62 Stat. 568;
Chapter 412 Laws of Minnesota 1933.

STATEMENT

In these actions the District Court entered a judgment enjoining the petitioners from violation of an executive order of the President of the United States. The order, executive order No. 10092, provides that the airspace below the altitude of four thousand feet above sea level over the roadless area of Superior National Forest is reserved and set apart as an airspace reservation and no person shall navigate an aircraft within that airspace reservation.

The petitioners have homes within the roadless area and on their property maintain resorts for the entertainment of guests during the summer months. Their homes and resorts are located on the boundary waters between the United States and Canada. It is conceded that the right of ingress to and egress from the homes and resorts of the petitioners located within the roadless area is taken away by the executive order of the President.

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the President of the United States has authority, under the Air Commerce Act of 1926 (44 Stat. 568) to set apart an airspace reservation for any and every governmental purpose.

2. In holding that it is a lawful delegation of power for Congress to grant to the President of the United States the right to set aside an airspace reservation for any and every governmental purpose in any part of the United States.

3. In holding that it is not necessary for the President to set forth in an executive order the purpose for which an airspace reservation is set aside.

4. In holding that the President of the United States has authority, by executive order, to interfere with intrastate commerce.

5. In holding that executive order No. 10092, which deprives the petitioners of ingress to and egress from their homes and resorts in the forest, does not take from said petitioners property without due process of law.

6. In holding that the President may by executive order prohibit a citizen of the United States from landing on boundary waters between the United States and Canada.

7. In holding that the Government has the right to take from a citizen the right to trial by jury by obtaining an order restraining him from violation of an executive order of the President and punishing him for contempt of court for violation of that order.

8. In holding that the Civil Aeronautics Act of the United States (55 Stat. 980) does give to the Government the right to regulate intrastate commerce.

REASONS FOR GRANTING WRIT OF CERTIORARI

A Writ of Certiorari is sought because the decision of the Court of Appeals is in conflict with decisions of this court and involves important questions of federal law which should be settled by this court. The questions involved are of great importance. The decision of the District Court, affirmed by the Court of Appeals, is to the effect that the President of the United States has au-

thority, under the Air Commerce Act of 1926, without further act of Congress, to set aside an airspace reservation any place in the United States of America regardless of the effect the airban may have on owners of private property or intrastate commerce.

The petitioners are owners of property within the area referred to as the roadless area of Superior National Forest in Northern Minnesota. Each of the petitioners Perko, Skala and Zupancich has improved his property to such an extent that the same is worth upwards of Seventy-five Thousand Dollars ($75,000.00). Each one has a summer home on his place and also a main lodge and cabins for guests who travel to Northern Minnesota for the tourist season. They have water works, sewage disposal, electrict lights and the other improvements necessary to make their guests comfortable. It is possible to get to these places by canoe but the journey is an arduous one and cannot be made by the older folks. It is fun for the boy scouts but even the petitioners themselves cannot make the trip by canoe and from a practical point of view ingress to and egress from their places in the forest are entirely cut off if the airban created by Executive Order No. 10092 is enforced and, if that order is enforced, the value of the property of the petitioners is destroyed.

It is the claim of the Government that authority was granted to the President of the United States by the Air Commerce Act of 1926 (44 Stat. 568) before Colonel Lindberg flew over the Atlantic Ocean, to set aside an airspace reservation and create an airban for any and every governmental purpose. It is the claim of the petitioners that the Air Commerce Act of 1926 does not give to the President such authority and that it was merely

"an act to encourage and regulate the use of aircraft in commerce and for other purposes" and provide for the inspection and use of aircraft which, at that time, was not in general use.

It is also the claim of the petitioners that, if the Air Commerce Act of 1926 can be construed to give any such authority to the President of the United States, it would be an unlawful delegation of power; that the President would be obliged to set forth specifically the purpose for which the order was issued; that the enforcement of the order would take from the settlers in the roadless area property without due process of law; that the enforcement of the order would deprive the petitioners of a right to trial by jury and would also be an interference with intrastate commerce.

CONCLUSION

For the foregoing reasons we respectfully submit that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD L. BOYLE,
712 Lonsdale Building,
Duluth, Minnesota.
FRYBERGER, FULTON & BOYLE,
Duluth, Minnesota,
Of Counsel for Petitioners.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	3
Argument	6
Conclusion	9
Appendix	10

CITATIONS

Cases:	
Bailey v. *Holland*, 126 F. 2d 317	8
Hurley v. *Kincaid*, 285 U. S. 95	9
Mason v. *United States*, 260 U. S. 545	7
United States v. *Causby*, 328 U. S. 256	8, 9
Yearsley v. *Ross Construction Co.*, 309 U. S. 18	9
Statutes:	
Act of March 3, 1891, Sec. 24, 26 Stat. 1095, 16 U. S. C. 471	3
Air Commerce Act of 1926, 44 Stat. 568, 49 U. S. C. 171:	
Section 4	2, 4, 6, 8
Section 6, as amended by Sec. 1107 (i) (3) of the Civil Aeronautics Act of 1938	7, 8
Shipstead-Nolan Act of July 10, 1930, 46 Stat. 1020, 16 U. S. C. 577	4
Civil Aeronautics Act of 1938, 52 Stat. 973:	
Section 3, 49 U. S. C. 401	8
Section 1107 (i) (3), 49 U. S. C. 176	3, 8, 11
Mason's Minn. Stat. Ann. §110.13	4
Miscellaneous:	
Executive Order No. 10092, 14 F. R. 7637	2, 4, 10
67 Cong. Rec. 9355	7
H. Rept. No. 572, 69th Cong., 1st sess	7
H. Rept. No. 1162, 69th Cong., 1st sess	7

208896—52